INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	1
Statutes and Regulations Involved	2
Statement	2
Proceedings Below	3
Reasons for Denial of Writ	4
1. The Court of Appeals below correctly held that the Lloyd-LaFollette Act prevented the summary removal of persons such as Respondent Roth from the Classified Civil Service, either by the device of making "exceptions" in such service or otherwise. The power of the President to make such "exceptions" for appointive purposes is not here challenged	4
2. The Court of Appeals below correctly held that Executive Order 9830 did not affect incumbents such as Roth holding classified positions but was a directive to department heads relating to power to make future appointments. Thus, no issue of Presidential powers to make "exceptions" in civil service is involved	11
Conclusion	14

CASES CITED

Bailey v. Richardson, 182 F. 2d 46, affirmed 341 U. S. 918	7
Carr v. Gordon, 82 Fed. 373 (C.C.N.D. Ill.)	8
Flemming v. Stahl, 83 Fed. 940 (C.C.W.D. Ark.)	8
Morgan v. Nunn, 84 Fed. 551 (C.C.M.D. Tenn.)	8
Myers v. United States, 272 U. S. 52	10, 11
Page v. Moffett, 85 Fed. 38 (C.C.D. N. J.)	8
Taylor v. Kercheval, 82 Fed. 597 (C.C.D. Ind.)	8
United States ex rel. Palmer v. Lapp, 244 Fed. 377	9
United States v. Perkins, 115 U. S. 483	10

STATUTES INVOLVED

Page

Civil Service Act of 1871 (March 3, 1871), Ch. 114, §9, 16 Stat. 514, 5 U.S.C. 631 ..... 6, 7, 9

Civil Service Act of 1883 (January 16, 1883), Ch. 27, §2, 22 Stat. 403, 5 U.S.C. 632, 633 ..... 6, 7, 9

Lloyd-LaFollette Act of 1912 (August 24, 1912), Ch. 389, §6, 37 Stat. 555, 5 U.S.C. 652 ..... 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14

Ramspeck Act (November 26, 1940), Ch. 919, Title I, §1 and 2, 54 Stat. 1211-1212, 5 U.S.C. 631(a), 631(b) 2, 9

EXECUTIVE ORDERS

No. 101, dated July 27, 1897, Eighteenth Annual Report, United States Civil Service Commission (1902), p. 282 ... 7

No. 8743, dated April 23, 1941, 6 F. R. 2117 2

No. 9830, effective May 1, 1947, 12 F. R. 1259 ..... 2, 3, 6, 11, 12, 13

No. 10463, dated June 25, 1953, 18 F. R. 3655 ..... 2, 6

MISCELLANEOUS

Brief filed by Department of Justice, Respondents in Opposition to Grant of Writ of Certiorari in Dorothy Bailey, Petitioner, v. Seth Richardson, Supreme Court, October Term, 1950, No. 49 6

History of the Federal Civil Service (1940) 6

Sageser, The First Two Decades of the Pendelton Act 6

A Study of Civil Service Reform (1935) 6

Foulke, Fighting the Spoilsmen (1919) 6

Fish, The Civil Service and the Patronage (1905) 6

Civil Service Commission, Supplement 3 to Departmental Circular 497 (August 26, 1947) 12

Civil Service Commission, Departmental Circular No. 694 (December 12, 1952) 12

48 Congressional Record, Part 6, 62nd Cong., pp. 5637, 5638 8

99 Cong. Record, Part 4, 83rd Cong., pp. 4512, 4513, 4514, 4527, 4542 10

99 Cong. Record, Part 5, 83rd Cong., pp. 5824-5834, 5975-5989, 5990 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 328

HERBERT BROWNELL, JR., Individually as the Attorney General of the United States and WILLIAM P. ROGERS Individually as Deputy Attorney General of the United States, *Petitioners,*

v.

LEO A. ROTH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The memorandum decision of the United States District Court for the District of Columbia (R. 41-47) is reported at 117 F. Supp. 362. The opinion of the United States Court of Appeals for the District of Columbia Circuit (petitioner's brief, pp. 1A-5A) has not yet been reported.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

1. Whether the Lloyd-LaFollette Act, which provides that an employee in the classified civil service shall not be dismissed summarily, limits the power of the President to ex-

cept particular positions or types of positions from that service, where making an exception would effect a summary dismissal of an incumbent employee otherwise entitled to that Act's protections.

2. If not, whether the pertinent Executive Orders (No. 9830, February 24, 1947, and No. 10463, June 25, 1953) removed respondent from the classified civil service and made him subject to summary discharge.

Statutes and Regulations Involved

The statutes and regulations are adequately set forth in the Petition.

Statement

This litigation involves the status, under the Lloyd-La-Follette Act, of a government employee who, after approximately fifteen years continued service in the employ of the United States as an attorney, was severed from his position by a notice of summary dismissal. The case was presented on the pleadings under Motions for Summary Judgment. The following basic facts are not controverted; they appear in appellant's complaint (R. 2, et seq.).

The respondent, Leo A. Roth, was employed as an attorney by agencies of the United States Government continuously since 1938. Upon compliance with the Ramspeck Act, effective November 26, 1940, 54 Stat. 1211, 5 U.S.C. 631 a, b (cum. Supp.), and having met the requirements of Executive Order No. 8743, dated April 23, 1941, promulgated thereunder, including taking of a non-competitive examination, the respondent acquired a competitive civil service status as an attorney in a classified civil service position effective April 15, 1943. Respondent served as an attorney, in a non-confidential, non-policy determining capacity, with the Department of Justice (with the exception of two years' service as an attorney with the Office of Price Stabilization; such service, however, is immaterial to the issues herein) from April 17, 1943, to the time of his dismissal, July 31,

1953. During his entire service within the Department of Justice his performance ratings were "Excellent," except as of June 22, 1953, when, under a different rating system, he was rated "satisfactory." On June 29, 1953, without receiving any complaint concerning the performance of his duties and without any charges being preferred against him, respondent was served with a notice summarily dismissing him from his position in the Department of Justice, his services to terminate as of July 31, 1953. Following receipt of such notice, respondent processed an appeal through the Civil Service Commission which, on July 24, 1953, found that respondent was entitled to the removal protections contained in the Lloyd-LaFollette Act and directed his reinstatement. The Attorney General ignored such directive, and the present court proceedings were instituted after the Civil Service Commission had informed respondent that it could take no further action.

Proceedings Below

On August 25, 1953, respondent filed a complaint for declaratory judgment and for mandatory injunction in the Federal District Court for the District of Columbia (R. 2). The Department of Justice filed an answer to the complaint on October 22, 1953 (R. 22). Thereafter, on November 4, 1953, respondent filed a Motion for Summary Judgment (R. 26) and on November 16, 1953, a cross Motion for Summary Judgment was filed by the petitioners (R. 32). The court below denied the respondent's motion, dismissed his complaint and granted the motion of the petitioners for summary judgment (R. 41). An appeal was taken to the United States Court of Appeals for the District of Columbia (R. 47.) That Court unanimously reversed the decision of the District Court and held that E. O. 9830 was not intended to apply to attorneys who, like respondent Roth, at that time were already in the classified civil service, and that, in any event, the respondent was entitled to the protec-

tive provisions of the Lloyd-LaFollette Act, 37 Stat. 555 (1912), as amended, 62 Stat. 354 (1948), 5 U.S.C. 652(a). The Court further concluded that the respondent's removal from his position was not in accordance with law and that he should be restored to the position (Petition, App. 1A-4A). The Court held that the prohibitions contained in the Lloyd-LaFollette Act against summary removal of those who were employed in the classified civil service, as was Roth, were clear and explicit and permitted of no exceptions. The Court further held that, unless that Act was to become meaningless,

> "Neither the formula of 'excepting' the kind of position a person holds, nor any other formula, can obviate the requirement of the Lloyd-LaFollette Act that 'No person in the classified civil service of the United States shall be removed . . . therefrom' without notice and reasons given in writing. The power of Congress thus to limit the President's otherwise plenary control over appointments and removals is clear."

REASONS FOR DENIAL OF WRIT

1.

The Court of Appeals below correctly held that the Lloyd-Follette Act prevented the summary removal of persons such as Respondent Roth from the Classified Civil Service, either by the device of making "exceptions" in such service or otherwise. The power of the President to make such "exceptions" for appointive purposes is not here challenged.

This case presents no issue of sufficient importance, nor is there probable error in the decision of the Court of Appeals below such as to warrant review by this Court. The power of the President to make, for appointive purposes, various exceptions and classifications in the classified civil service, and to prescribe rules and regulations respecting admis-

sion thereto, is not here challenged or even involved. We are concerned here solely with the narrow question of the scope of the President's power to remove incumbents from governmental positions previously acquired and under which certain protections against summary removals had already vested under a law of Congress enacted specifically to provide such protections. That Act is the Lloyd-La-Follette Act of 1912 (37 Stat. 555, as amended in 1948, 62 Stat. 354, 5 U.S.C. 652(a)), which states clearly, without exception or qualification, that "No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing," and which further provides that any person whose removal is sought shall be entitled to notice of charges and opportunity to answer. The Lloyd-LaFollette Act is the sole Congressional enactment dealing with the subject of removals in the civil service field. The power of removal must be sharply distinguished, as petitioners fail to do, from the power to make exceptions or classifications in the civil service or to prescribe rules respecting admission thereto, which, as we shall see, are the subject of other and prior Congressional enactments and which are qualified by the 1912 Act.

The United States Court of Appeals for the District of Columbia—a Court recognized as particularly expert and qualified in the determination of the type of issues here involved—had no difficulty in unanimously deciding that the removal protections of the Lloyd-LaFollette Act could not be obviated by so simple a formula as reclassifying or excepting positions in the federal service, not for appointive purposes but to effect a summary removal of incumbents otherwise entitled to Lloyd-LaFollette procedures. We respectfully submit that the reasoning of that Court is irrefutable. Briefly stated, it is that the Congress in Lloyd-LaFollette has specifically forbidden, in language

generally directed,[1] the removal of federal employees who have acquired a position and status in the classified civil service without stating reasons or filing charges and giving opportunity for a reply. Respondent Roth had admittedly acquired that position and status in the classified civil service as of April 15, 1943, and admittedly had it at the time E.O. 9830, purporting to remove him, was promulgated in 1947. He continued to hold such status and position as an attorney both in June of 1953 when Executive Order 10463 was issued and in July of 1953 when he was summarily dismissed, unless E.O. 9830 can be said to remove him from his position and strip him of his Lloyd-LaFollette protections. However, to permit Lloyd-LaFollette to be bypassed by the simple expedient of reclassifying a position or making an exception, through executive or administrative dictate, would provide a device which could quickly and easily be used to eliminate the sole protection against arbitrary discharge which the non-veteran federal career employee has possessed since the 1912 Act. Accordingly, Roth must be held entitled to the removal protections prescribed by law if that law is to have any meaning or effect.

Petitioners attempt to minimize the purpose and scope of the Lloyd-LaFollette Act in their account of its legislative history, as set forth in their petition, pp. 13-14. We prefer another account of the history and purpose of that Act as

[1] The argument of petitioners (Petition, p. 12) that the command of the Act is addressed to the "officer or employee directing the removal," and that "the President is not an officer or employee of the United States," is so specious as to require answer only by reference to the express language of the Act. Even assuming (without admitting) that the President is not an officer or employee of the United States, the command of the Act broadly prohibits summary removals without any qualifications or reference to any person or class of persons to whom such command may or may not apply. The reference to "officers or employees" occurs not in the command portion of the Act but only in that portion dealing with removal procedures, with specific reference to the discretion to grant a hearing, which, of course, is a matter customarily left to a department head, and not to the President, for determination.

given by the Department of Justice in its brief[2] submitted to this Court in the case of *Bailey v. Richardson*, affirmed 341 U. S. 918. There, this Court was advised as follows:

> "Prior to the innovation of a classified Civil Service, practically all officers and employees were appointed and removed, advanced and demoted, on the basis of their political opinions and affiliations. The power to dispense public offices were deemed a perquisite of success at the polls. See United States Civil Service Commission. *History of the Federal Civil Service* (1941); Sageser, *The First Two Decades of the Pendelton Act; A Study of Civil Service Reform* (1935); Foulke, *Fighting the Spoilsmen* (1919); Fish, *The Civil Service and the Patronage* (1905). The abuses inherent in the periodic wholesale summary dismissal of incumbent employees for political reasons led to the enactment of the Civil Service Act of 1883. Act of January 16, 1883, 22 Stat. 403, 5 U.S.C. 632 et seq. But the only limitation placed upon the power to remove summarily was the prohibition of removal for failure to contribute to any political fund or to render any political service. 5 U.S.C. 633. To further the policy of that Act, however, President McKinley issued an Executive Order in 1897 prohibiting summary dismissals from positions subject to competitive examinations. Under the authority vested in him by R. S. 1753 he ordered that no removal should be made 'except for just cause and upon written charges filed with the head of the Department, or other appointing officer, and of which the accused shall have full notice, and an opportunity to make defense.' Executive Order No. 101, July 27, 1897, Eighteenth Annual Report of the United States Civil Service Commission (1902) p. 282. Despite the Presidential Order, removals for political reasons appear to have continued. Since the Order was not issued to implement any statute restricting the executive power of removal, it was held

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[2] Department of Justice Brief for Respondents, pp. 68-71, on Writ of Certiorari in the United States Court of Appeals for the District of Columbia Circuit, in *Dorothy Bailey, Petitioner v. Seth W. Richardson*, Supreme Court, October Term, 1950, No. 49.

not to be judicially enforceable. See *Page v. Moffett*, 85 Fed. 38 (C.C.D. N.J.); *Morgan v. Nunn*, 84 Fed. 551 (C.C.M.D. Tenn.); *Flemming v. Stahl*, 83 Fed. 940 (C.C.W.D. Ark.); *Carr v. Gordon*, 82 Fed. 373 (C.C.N.D. Ill.); *Taylor v. Kercheval*, 82 Fed. 597 (C.C.D. Ind.).

"Accordingly, in 1912, proponents of the merit system obtained the passage of the Lloyd-LaFollette Act which enacted into positive law the provisions of the earlier Order. Employees were given the right to be notified of the charges and to 'be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof. . . .'" • • • •

"That record of one hundred and sixty years is 'a page of history worth a volume of logic.' It is a history the writing of which was shared by the judiciary."

Examination of the legislative history of that Act indicates an overall purpose on the part of Congress to establish protections against arbitrary or summary removals in the federal civil service so that career personnel devoting their lives to government work would be afforded a security which might render such careers more attractive and which would, in turn, raise the caliber of that service. (Cong. Rec., Vol. 48, Part 6, 62nd Cong., pp. 5637, 5638.)

Petitioners (Petition, p. 15) deplore what they term a repeal by implication of the President's power to make exceptions in the classified civil service. While, as before stated, there is involved here no challenge to that power when exercised, as it normally would be, in connection with admission or appointments to the federal civil service, it should be noted that there is no specific statute conferring upon the President the power to make exceptions and no specific law expressly dealing with that power. Whatever rights or powers the President may have in respect to removals must be implied from his power to make admissions under R. S. 1753. It is, therefore, difficult to determine just what law or authorization is being repealed by implication. Congress has passed only four basic civil service statutes in this field, in none of which is the power to make exceptions

expressly prescribed, and only one of which deals with the subject of removals. In 1871, in what is generally referred to as R. S. 1753, the first Civil Service Act, Congress authorized the President "to prescribe such regulations for the admission of persons into the civil service of the United States as will best promote the efficiency thereof. . . ." (Rev. Stat. §1753, 5 U.S.C. §631.) In 1883 it authorized the appointment of a Civil Service Commission as an aid to the President in preparing rules for carrying into effect the plans for a classified civil service (22 Stat. 403, as amended, 5 U.S.C. §633). In 1940, under the Ramspeck Act previously referred to, it authorized the President "to cover into the classified civil service any offices or positions in or under an executive department, independent establishment or other agency of the Government. . . ." (60 Stat. §1352, 5 U.S.C. §631(a).) It is to be noted that these enactments refer only to the *admission or classification* of persons into the civil service. They contain *no* provisions respecting the *discharge* or *removal* of persons who have obtained a position in the classified civil service. Congress has spoken in this respect only in the Lloyd-LaFollette Act of 1912, and amended in 1948. In the 1948 amendment Congress added to and strengthened the protections of the Lloyd-LaFollette Act by prohibiting suspensions without pay except upon notice and opportunity to answer. (cf. 5 U.S.C.A. 652(b) Cum. Supp.) Since the Lloyd-LaFollette Act follows in point of time the 1871 and 1883 Acts, and since its 1948 amendment follows the 1940 enactment, that law must be considered as an exception to whatever power the President possesses to include or except positions from the classified civil service where such inclusion or exception operates as a removal, although it might be added, parenthetically, it would not affect the President's right to make exceptions or classifications for appointive or admission purposes. The case of *United States ex rel. Palmer v. Lapp*, 244 F. 377, is direct authority for this proposition. There, it was stated (p. 383):

> "The purpose of the act of 1912 was to change the existing law by restricting the discretionary power of superior officers in the matter of removals. It was designed to give greater security to those occupying subordinate positions, and thereby to improve the public service, by requiring that removals shall be for cause and after a hearing. . . . *The Act of 1912 is amendatory of the previous civil service law, adding thereto an additional section to remove a fault and better the then existing law.*" (Emphasis added.)

It is significant to note that the Executive Department, as well as members of Congress, as of recent date deemed the Lloyd-LaFollette Act a general bar to the summary dismissal of employees in the classified civil service, and the Executive Department felt it necessary to make application to Congress to provide specific exceptions to the broad Lloyd-LaFollette protections when it desired to obtain the power to summarily remove certain classes of federal civil servants. On May 5, 1953, the petitioner Attorney General sought legislation to amend the Lloyd-LaFollette Act which would enable him to terminate at will the employment of attorneys (debates on H. R. 4974, 83rd Cong., 1st Sess., 99 Cong. Rec. Part 4, pp. 4512-4542)). After floor debates, members of the House and Senate refused to amend the Lloyd-LaFollette Act to effectuate this purpose. (99 Cong. Rec. Part 4, pp. 4542 and Part 5, pp. 5989-5990)). The legislative debates in this connection evidence keen concern by Congress to protect the government employee who had acquired protective rights against summary removals. (See 99 Cong. Rec., Part 4, pp. 4513, 4514, 4527 and Part 5, pp. 5824-5834, 5975, 5989-5990.)

Petitioners apparently now challenge (Petition, p. 16), although they did not do so below, the right of Congress to impose limitations on the President's power to remove lower level federal employees in the administrative service. This Court many years ago considered and laid at rest the constitutional question thus posed. In *United States v. Perkins*, 115 U. S. 483, 484-5, (cited with approval in *Myers*

v. United States, 272 U. S. 52, at p. 160) this Court stated:

> "It is further urged that this restriction of the power of removal is an infringement upon the constitutional prerogative of the Executive, and so of no force, but absolutely void. Whether or not Congress can restrict the power of removal incident to the power of appointment to those officers who are appointed by the President by and with the advice and consent of the Senate under the authority of the Constitution (Article 2, Section 2) does not arise in this case and need not be considered. We have no doubt that when Congress by law vests the appointment of inferior officers in the heads of departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies the authority to limit, restrict and regulate removal by such laws as Congress may enact in relation to the officers so appointed. The head of the department has no constitutional prerogative of appointment to offices independently of the legislation of Congress; and by such legislation he must be governed, not only in making appointments but in all that is incident thereto."

2.

The Court of Appeals below correctly held that Executive Order 9830 did not affect incumbents such as Roth holding classified positions but was a directive to department heads relating to power to make future appointments. Thus, no issue of Presidential powers to make "exceptions" in civil service is involved.

A final and very persuasive reason why this Writ should not be granted lies in the fact that this case can be disposed of, as it was by the Court of Appeals below, by a proper construction of Executive Order 9830 under which that Order would "except" subsequently appointed attorneys from the need for taking Civil Service examinations. Such a construction would make it unnecessary to inquire into the broader question of Presidential removal powers which are raised in the Petition herein. Petitioners have attempted to construe and apply that Order so as to make

it applicable to incumbents such as Roth who had already been appointed to and achieved a status in the Classified Civil Service. The Civil Service Commission, in a series of rulings issued prior to the Keech decision below, and the Court of Appeals in this case, have put a different construction upon that Order, and said that it has no application to previously appointed incumbents such as Roth. This construction would raise no question respecting the scope and application of the Lloyd-LaFollette Act and the effect of that Act on the Presidential power, however derived, to except particular positions or types of positions from the Classified Civil Service. As construed by the Court below and by the Civil Service Commission prior to the Keech decision,[3] E.O. 9830 amounts simply to a grant of permission to department heads that following promulgation of the Order they can make future appointments in the excepted classifications without the need for civil service examinations. The Order is set forth on page 7A of the Appendix of the petitioners. It is to be noted that prospective language is used throughout the Order and it has reference specifically to the power to make appointments which in itself suggests future, not retroactive application. The principal purpose of the Order was obviously to facilitate the subsequent acquisition of necessary personnel. To say that this Order was also designed to deprive persons of a civil service status is not only unreasonable and inconsistent with its overall purpose but would accomplish, in addition to an illegal result, a result that is both punitive and unnecessary when it is considered that the persons thus to be deprived of their protections have already been appointed and are performing satisfactory service in the necessary jobs.[4] The

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[3] Supplement 3 to Departmental Circular No. 497 (R. 40), Departmental Circular No. 694 (see Petition, p. 23, f. n. 29), and two rulings in the Roth matter as set forth at R. 12 and R. 20, 27.

[4] In response to petitioners' argument on page 21 of their Petition that it would have been unnecessary to specifically provide in Sec. 6.1(f) of E.O. 9830 that the Civil Service Rules and Regulations relating to removals were available to competitive status employees in Schedule A if, as we contend, the statutory protections were al-

construction placed upon the Order by the Civil Service Commission and the Court of Appeals below is consistent with common sense, and would reconcile that Order with applicable statutory law so that the question of presidential removal powers urged by Petitioner as reasons for granting this Writ would be eliminated.

Petitioners have raised various policy considerations, notably that the construction given by the Court below to the Lloyd-LaFollette Act and to E.O. 9830 would freeze Federal career employees in their positions and would bind the hands of succeeding administrations to remove civil servants who might for various reasons be unacceptable to the administration in power. Aside from the fact that there would be no such freezing because removal can always be accomplished for cause, the fact remains that Congress has spoken otherwise, and E.O. 9830 does not clearly command the termination of the Lloyd-LaFollette Act protections to Federal employees situated similarly to Roth but can be constructed consistently with what is direct Congressional mandate. Congress has deemed that to afford removal protections to the federal servant as a means of attracting qualified personnel to a civil service career and of insuring the federal government of the highest caliber of employees is more important than considerations of political expediency as they may arise from administration to administration. It is unfortunate at this particular time, with the Government reaching into all aspects of American life, and when it is of the utmost importance that we do have the highest possible caliber of persons attracted to federal employment, that the principal remaining protection to which the federal careerist, especially those who are not veterans, can look, namely, the Lloyd-LaFollette Act, is being challenged and minimized.

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ready there, the answer is that the Executive Order not only implemented the existing statute, but it was absolutely necessary to specifically provide protective measures to competitive status employees appointed *after* promulgation of E.O. 9830; otherwise the latter would have had no such removal protections, their positions having been excepted by E.O. 9830.

CONCLUSION

Respondent Roth, continuously employed since 1938 in an attorney position with the Federal Government, was admittedly at one stage of his career in the classified civil service and entitled to Lloyd-LaFollette Act protections. At another, without change in status or position he finds himself removed from that service by administrative dictate, through no fault of his own, without specification of charges, contrary to the procedures specifically prescribed in Lloyd-LaFollette. By what magic was this accomplished and how can the Lloyd-LaFollette Act have any efficacy if the contentions of the petitioners are to prevail? These questions remain unanswered in this case, and cannot be answered without reading Lloyd-LaFollette out of the books.

We respectfully submit that the decision of the Court of Appeals below is a correct one and that there is herein involved no issue of sufficient importance and no question of error such as to require review by this Court.

The Petition herein should be dismissed.

Respectfully submitted,

J. Albert Woll,
Herbert S. Thatcher,
James A. Glenn,
736 Bowen Building,
Washington 5, D. C.,
Counsel for Appellant.

James M. Fallon,
736 Bowen Building,
Washington 5, D. C.,
Of Counsel.